United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1204

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IN THE

United States Court of Appeals

For the Second Circuit

No. 75-1204

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

THOMAS JAMES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ~~SOUTHERN~~ EASTERN DISTRICT OF NEW YORK

APPELLANT THOMAS JAMES' BRIEF

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BRIEF FOR APPELLANT THOMAS JAMES

Preliminary Statement

The Appellant, Thomas James, appeals from a Judgment of Conviction entered in the United States District Court for the Eastern District of New York (Bramwell, J.) adjudging him guilty of a one count violation of the Federal narcotics laws relating to the sale of heroin; Title 21, United States Code, Section 841(a)(1). As a result of this conviction, Appellant

was sentenced to a seven-year term of imprisonment in addition to a special parole term of five years.

The Indictment appears on page four (4) of Appellant's Appendix.

STATEMENT OF THE FACTS

Thomas James was indicted for an alleged sale of twenty grams of heroin to an undercover policeman on August 24th, 1971. The major thrust of the Government's case against James was the testimony of George Mc Coullum, a New York State police officer. (A 5)[1]

Although a New York State police officer, Mc Coullum in August of 1971 was assigned to the Federal Bureau of Narcotics' office in Westbury, Long Island. (A 6)[2] On August 24th, 1971

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[1] The letter "T" refers to the trial transcript while the letter "A" introduces reference to the Appellant's Appendix.

[2] Later in the trial, the Government called one Lawrence P. Mc Elynn as a witness. The Court stenographer, in preparing the transcript, repeatedly confused these two names. After an informal conference between counsel for the Appellant and Government counsel, the appropriate and obvious changes were agreed to. So that this Court is not confused, it is the testimony of Investigator Mc Coullum which begins at page 25 of the transcript and the testimony of Federal Agent Mc Elynn begins on page 160 of the trial transcript.

Mc Coullum met with two known informants identified as "Moe" and "Maureen". (A 7)[3] Mc Coullum then described some routine procedure which usually precedes an undercover purchase of narcotics. (A 8 - 9) After taking these precautions, Mc Coullum left the agency office in a Government vehicle with his charges, "Moe" and "Maureen". (A 9)

The trio's first stop was Bruno's Tavern located in Jamaica, Queens. (A 9) The agent and the informants there looked for a prospective vendor but were unsuccessful. (A 10) Leaving Maureen in Bruno's Tavern, Moe and Mc Coullum explored other taverns in the area "in an attempt to locate a certain person we were looking for." (A 10) Again unsuccessful, Mc Coullum and Moe returned to the Bureau office in Westbury. (A 10)

Undaunted, Mc Coullum and Moe returned to Bruno's Tavern in the early evening. (A 10 - 11) At this time, some eight or nine persons were standing in front of the tavern apparently

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[3] "Moe" was later identified as Moses Roper who was called as a witness for the defense. (T 223) "Maureen" was Roper's girlfriend who testified for the Government. (A 89)

engaged in conversation. (A 11) Parking his vehicle, Mc-Coullum approached the group with Moe. (A 12) Moe then called a person from the group who was identified as Appellant. (A 12) According to Mc Coullum, Moe introduced the agent to Appellant as a cousin from Washington, D.C. who came to New York to purchase a half kilo of heroin. (A 12) In typical fashion, the agent then told Appellant that he initially wanted to purchase one ounce in order to evaluate the quality of the merchandise. (A 12 - 13) Agent Mc Coullum noted that for purposes of this undercover buy, he had been provided with pre-recorded Government funds. (A 13)

Agreeing on a price, Mc Coullum was then instructed to go inside the tavern and wait. (A 14) Joining Moe and Maureen, the agent waited in the bar for about an hour. (A 15) Returning as promised, the Appellant allegedly entered the tavern and beckoned the agent to the restroom. (A 16) There the narcotic was exchanged for $1,200 in official Government money. (A 16) Mc Coullum noted that he was introduced to this individual as Tommy. (A 17) The agent and the informants then left the premises and later a field test was conducted on the substance revealing its narcotic content. (A 18 - 21)

Mc Coullum never again saw the individual who sold him the heroin until February of 1975 when the case was first tried.[4] When cross-examined as to the identification he had made, Mc-Coullum admitted that Moe had told him that the person who sold the drugs was named Tommy Mitchell. (A 66)

Mc Coullum's testimony was partially corroborated by the testimony of Maureen De Pace, Moe's girlfriend and co-informant. (A 89) De Pace, an admitted drug addict (A 91), recalled that on the night of August 24th, 1971, she was present in Bruno's Tavern. (A 92) Also present that night, she said, was Appellant whom she knew only as Tommy. (A 93) The witness recalled going to Bruno's in the afternoon of that day with Agent Mc Coullum and Moe and stated that she remained there into the evening. (A 94) At about 7:00 p.m., Maureen heard Moe's voice and then saw Moe and Mc Coullum on the street talking to Tommy. (A 94) Unable to recall any particular conversations, the witness remembered waiting with the agent and Moe in the bar for about an hour. (A 95) The witness

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[4] The first trial of this case resulted in a mistrial after the jurors were unable to agree upon a unanimous verdict.

later saw Tommy, Mc Coullum and Moe walk to the back of the bar together. (A 96 - 97) Tommy, according to the witness, walked over to a girl in the bar and allegedly in plain view "she gave him a plastic bag that had white powder in it." (A 98) A few minutes later, Mc Coullum reported to Maureen that he had made the purchase. (A 98)

The third and final witness called by the Government was Agent Lawrence P. Mc Elynn of the Drug Enforcement Administration. (T 160) Mc Elynn testified that on the day in question, he acted as a surveillance agent following the activity of Investigator Mc Coullum. (T 163) Corroborating all the activity which preceded the purchase, Mc Elynn testified that he saw Mc Coullum and Moe in a conversation with an individual outside Bruno's Tavern. (T 167) From his vantage point, however, Mc Elynn was unable to identify Appellant. (T 189)

The defense called Moses Roper, previously described as the informant "Moe" by Agents Mc Coullum and Mc Elynn. Roper, declared a hostile witness (T 222), testified that he did not actually see either the sale or a girl pass drugs to Tommy. (T 228) Roper's testimony proved to be somewhat inconsistent with the account furnished by Agent Mc Coullum. (T 233- 255)

Appellant's trial counsel also attempted to elicit a motive for the witness' implication of Appellant. (T 236 - 242)

In August of 1972, one year after the occurrance in question, Tommy James was arrested. (T 210)

STATUTES INVOLVED

Title 21, United States Code, Section 841(a)(1) states in pertinent part as follows:

> "§841 Prohibited acts A -- Unlawful Acts
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

QUESTION PRESENTED

Whether the Trial Court failed to preserve an atmosphere of impartiality thereby depriving Appellant of his right to a fair trial?

ARGUMENT

THE TRIAL COURT'S COMMENTS DURING THE COURSE OF THE TRIAL DEPRIVED APPELLANT OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL.

Where a defendant is alleged to have sold contraband directly to an undercover agent, a defense lawyer is faced with perhaps the most difficult of criminal cases to defend. The difficulty of defending "direct sale" cases lies in the fact that the agent, in actuality, does not spring from a criminal milieu and is, therefore, not as easily subject to a full scale attack on his credibility. The task is made even more difficult where the Government employs such investigative techniques as surveillance agents, pre-recorded monies and surreptitious recordings. Ordinarily, therefore, proof of guilt in "direct sale" cases is overwhelming and only the most serious error will require reversal.

The case at bar, although it involves the alleged direct sale of heroin to an undercover policeman, stands in marked contrast to the classic case described above. It is the epitome of understatement to describe the episode at bar as an unorthodox example of a "direct sale" case. Despite the

presence of surveillance agents, despite the fact that pre-recorded funds were used, this case depended on an identification made by an agent of an individual whom he hadn't seen since his very brief encounter with him some four years earlier. The only corroboration of this identification came from two closely aligned informant-witnesses whose testimony bared their own interest to aid the Government. This Appellant, as previously noted, was not arrested until one year after he allegedly made the sale. This fact cast considerable doubt on the Government's entire case. If Investigator Mc Coullum's purpose was to arrest Moe's connection for selling one ounce of heroin, he had the golden opportunity when the pre-recorded funds were passed and a backup team of surveillance agents were in the area. If, on the other hand, the agent was fishing for a larger catch and wanted kilo quantities, it is unclear why he never again approached the "connection".

This brief analysis of the Government's case is presented to demonstrate that the evidence against Appellant, while legally sufficient, was not overwhelming.[5] Appellant herein

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[5] Witness the fact that in the first trial the jury was unable to reach a unanimous verdict.

submits his claim of error in this context. It is clear that in such a case, as indeed in any other case, the Trial Court must preserve an atmosphere of impartiality. It is submitted that in this case, the Trial Court failed to do so and thus undermined the Appellant's case.

The core of the defense of this case was that the Appellant was not the man who sold the heroin to Investigator Mc Coullum in Bruno's Tavern on that August evening. In his opening statement to the jury, Appellant's trial counsel stated that:

> "The defense of this case is recognized throughout the world, and as lay people, one of the heart of the matters is did he do it, and in this case the defense is that type of real defense, this man, the sale was made in that bar by that Upstate Trooper, this man did not make the sale; that is the type of real defense that we are dealing with and I'm going to ask you now to live up to the oath that you swore before this Court and before the witnesses here. (T 7)

In concluding his summation, counsel reiterated that:

> "The defense in this case is one of identification. . ." (T 273)

Consistent with this defense, it was of utmost importance to carefully examine Mc Coullum as to the appearance of the person who sold him the drugs almost four years earlier. During

cross-examination, trial counsel focused on whether the witness Mc Coullum had noticed any marks or scars on the face of the man who sold him the drugs.

"Q Did you notice any marks on the man's face that you were speaking with?

A No, I did not.

Q Were you in a position to see those marks, were you not if he had any?

A I would have been in position to see them, yes." (A 60 - 61)

After questioning Mc Coullum on the subject of the individual's height, trial counsel obtained the Court's permission to exhibit Appellant to the jury for the purpose of showing height and his face. (A 61) Counsel then asked the witness the following questions:

"Q See this scar?

A Yes, I see it.

Q Were you in the position to see this scar if he had it when you were speaking with him?

A Yes.

Q Did you see it?

A Not that I recall, no.

THE COURT: Let the record indicate there is a scar on the left chin of the defendant. The scar is not a prominent one and it conforms to the confirmation of his chin at that point.

Q Do you see the scar above his left --

THE COURT: And the Court cannot see a cut over there from here, counsel.

MR. QUAGLIATA: Judge.

THE COURT: You'd better bring him closer for that examination because I can't see that other one at all.

MR. QUAGLIATA: Judge --

THE COURT: I understand, but I'm telling you it can't be seen and I can't see it from here. And turn around and let the jury see it.

MR. QUAGLIATA: I'm going to.

THE COURT: Turn around and let the jury see his face. And show them the point on which you showed the other scar not that one the other one.

MR. QUAGLIATA: The scar I first showed him, this is the scar I'm inquiring about now. If he may, Judge.

THE COURT: Sure, let him go. The scar on the eyebrow would only be visible with a very, very close examination. It's not visible normally. You may sit down." (A 62 - 63)

Appellant's trial counsel, therefore, had attempted to challenge Investigator Mc Coullum's identification by showing the jury that Appellant had a scar or scars which were not noticed by the investigator on the person who sold the drugs. The relative worth of this proposition was a question which was solely for the jury's consideration. It has long been established that a Federal Trial Court may

> ". . . assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."

Quercia v. United States, 289 U.S. 466 (1933); United States v. Philadelphia & Reading R.R. Co., 123 U.S. 113 (1887). This inherent authority, however, is not without certain caveats. In Quercia, the Supreme Court cautioned that a Federal Judge

> ". . . may analyze and dissect the evidence, but he may not either distort it or add to it."

This obvious limitation was articulated in recognition of the inestimable influence which a Trial Judge casts upon a jury. As stated in the 1894 Term of the United States Supreme Court:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

Starr v. United States, 153 U.S. 614 (1894).

In the instant case, Appellant contends that the Trial Court overstepped the parameters of the applicable safeguards in not only this but in another instance.

On cross-examination of Maureen De Pace, counsel reviewed, in appropriate detail, the events which allegedly took place in Bruno's Tavern. De Pace, it will be remembered, was one of only two Government witnesses to implicate the Appellant James. Her testimony, without question, was critically important. Although important, the direct and cross-examination of the witness De Pace was relatively short. In fact, the cross-examination of De Pace consumed only fifteen transcript pages. (A 99 - 114) Seemingly disturbed by counsel's examination, the Court interjected and stated that:

"THE COURT: Some instances your misinterpreting because its perfectly clear she's made it perfectly clear just how this thing happened. That's the second time she's gone over that story.

But you hold up your fingers three when there is two. You make different gestures which are not consistent with what this woman is saying. But you go right ahead and have your cross-examination, go right ahead.

MR. QUAGLIATA: Judge, I believe I am honestly trying to get --

THE COURT: Counsel, I'll read the testimony to you if there is a problem. But I'm telling you it's not proper that way. But you go right ahead. (A 111 - 112)

Shortly thereafter, counsel moved for a mistrial on the basis of the Court's conduct.

"MR. QUAGLIATA: Sir, my application is for a mistrial of this matter. Your Honor has interrupted me on two separate occasions. One, when I was in the process of cross-examining Agent Mc Coullum and when your Honor interjected and said certain scars that were on the defendant's face were not visible. I think that was improper.

And the second motion and more recently, your Honor interrupted my cross-examination of the girl and intimated that I believed that I

was trying to manipulate the witness into saying certain things.

Now, Judge, let me finish.

THE COURT: Go right ahead, go right ahead.

MR. QUAGLIATA: Or doing certain things that were inconsistent with the truth. Now I would like to state to the Court right now that I did not understand in my own mind what the situation was and what her testimony was. I was trying to get at it exactly what it was.

Your Honor made the statement in the presence of the jury I think it was highly prejudicial to the defendant and for that reason, I am going to ask for a mistrial.

THE COURT: Well, counselor, in the first place it was your application that brought Tommy James in front of the jury for the purpose of displaying the scars. That was your application.

Now, in connection with that particular application you were saying certain -- the Court wanted the record, the record in some way to show what these scars were. And you, in his left eyebrow, you made a statement as to the fact there was a scar and I haven't seen that scar yet.

THE DEFENDANT: Your Honor, I do have a scar.

THE COURT: I am sure you have. I am sure you have but it's not visible. It's not visible.

Now, as far as what you did in front of the jury, you may have been doing it unconsciously or unknowingly or you may not have comprehended what was being responded to you by that witness. But at one point just after she told you there were two people, you put up three fingers and asked another question seeking to elicit from that witness the fact there were three. When she had just told you there were two people there.

MR. QUAGLIATA: Judge, in all consciousness --

THE COURT: You were --

MR. QUAGLIATA: I don't understand what you're talking about, Judge. I can't remember what you're talking about.

THE COURT: Maybe you did it unconsciously and the application is denied. You may have done it unconsciously and you may not have been comprehending what the witness had said to you. But the Court cannot permit you to make gestures or to make statements which are inconsistent with what you are being told directly. Directly at that point by a witness.

MR. QUAGLIATA: Well, Judge, I don't even know and I'm telling you as a member of the bar, I don't know what your Honor is referring to. I don't remember putting up three fingers.

THE COURT: That was your left hand; that was your

left hand and you put up those three fingers. The witness had just told you there were two people and you put it up like this and you asked the question. Your left hand, you asked the question of the witness and this is very prejudicial. It should not be done.

MR. QUAGLIATA: Judge, but Judge, I don't know what you're talking about. I don't remember doing it.

THE COURT: If you don't remember doing it, then the next time try not to do it.

MR. QUAGLIATA: Well, Judge, the fact of the matter is now you made a statement in the presence of the jury that makes it impossible for this defendant to receive a fair trial. And I am going to ask you to declare a mistrial and let's start over with another jury.

THE COURT: The application is denied. Ready to proceed?

MR. THOMPSON: Yes.

MR. QUAGLIATA: Just so we could round out the record, I would like to see if Mr. Thompson knows what you are referring to so that maybe I can be enlightened as to what happened.

THE COURT: At the time it happened you were standing directly in front of Mr. Thompson. I don't know if he was looking at you or if he saw you. But I most certainly did and you were standing directly in front of Mr. Thompson at that time.

MR. QUAGLIATA: Judge, all I can say, I have no recollection certainly it was never my intention to do any such thing. I don't know very honestly, Judge, if what your Honor saw was what happened. I don't --

THE COURT: I know it was what happened. I know it was what happened. Regardless of whether you know it or not, I saw you. I saw you. And this was behind the question where the witness stated directly there were two people and raised up three fingers and asked her and repeated the question and repeated.

MR. QUAGLIATA: Judge, the indication that this jury must have is that I am trying to deceive the witness or trying to deceive the Court or trying to deceive the jury, Judge, and I can tell you that I don't remember doing what your Honor says I did. And I think it was tremendously improper for you to judge on the situation the way you did.

THE COURT: Because it was that prejudicial and it was that much of a distortion of the truth that I felt no other way to proceed. It was that much of a distortion of the truth.

MR. QUAGLIATA: Well, Judge, I hope you realize that if the witness says there were two people, if she said it as clearly as what your Honor seems to have understood it --

THE COURT: No question.

MR. QUAGLIATA: Then the jury must have understood it. They must have thought I was an idiot by putting up those three fingers.

THE COURT: I don't know what the jury thought.

MR. QUAGLIATA: Neither do I. But I do know what they think now, Judge. They think that you think I personally manipulated that witness trying to convince the jury.

THE COURT: Counselor, counselor --

MR. QUAGLIATA: Don't you see the position I'm in?

THE COURT: The testimony of this witness is completely consistent on cross, on direct and on cross. The testimony of this witness is consistent and it may be, it may be that the testimony of this witness may be a problem for -- I don't know.

MR. QUAGLIATA: It is. I couldn't understand it. That's why I kept asking the lady questions.

THE COURT: I certainly understood it.

MR. QUAGLIATA: Judge, that doesn't mean I understood it.

THE COURT: If you don't, maybe I should give you a re-reading so that you can understand it.

MR. QUAGLIATA: Judge, whatever you should have done I don't think you should have done in the presence of the jury and I could assure this Court from lawyer to judge that never in the time that I first

practiced would I pul' a stunt like that.

THE COURT: Well, it may be, it may be that the Court was in error, I agree with you, in part. But the actions were so pointed and so directed that it was inconsistent with a proper approach to a witness.

MR. QUAGLIATA: Judge, if we read back the testimony it's obvious that I did not understand what this last witness was saying. I just didn't understand it.

THE COURT: The application is denied. Are you ready for the next witness." (A 115 - 121)

One problem facing Appellant on this appeal is that a cold reading of the trial record does not often reflect the impact of the Trial Court's remarks. It may be appropriate, therefore, to note the impact that these remarks had on experienced defense counsel. Immediately after the Court denied counsel's motion for a mistrial, the following application was made:

"MR. QUAGLIATA: I ask now that we adjourn until tomorrow morning.

THE COURT: No. We have listened and we haven't gone this much today. We have a witness here and I see no reason -- now, if you want to adjourn after he's through with his direct I may consider that. But I don't see why we can't finish

a witness today.

MR. QUAGLIATA: Fine, Judge. I can't proceed because I'm upset. Inside of me I am upset, I can tell you that right now. If your Honor would grant the motion to continue my cross-examination for tomorrow morning, then I would appreciate that.

THE COURT: All right. Put the direct on. He has cross-examine tomorrow.

Have you got a witness?

MR. THOMPSON: Yes, your Honor.

THE COURT: Bring the witness in.

THE DEFENDANT: Your Honor.

THE COURT: No, sit down.

THE DEFENDANT: Wait a minute. I don't believe my lawyer represents me. I don't believe that he can represent me being the way that he is right now. I don't believe that he can do it. That's my feeling toward him. I don't believe --

THE COURT: We'll adjourn until tomorrow. Handle it properly. We'll adjourn it until tomorrow morning. Bring in the jury." (A 121 - 122)

It is clear that this was not some parenthetical observation of the Trial Court which caused the adversarial furor reflected in the record.

More than twenty-three years ago, in United States v.

Brandt, 196 F.2d 653 (2nd Cir., 1952), this Court stated that a Trial Court:

> ". . . must remain the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested."

This Court further stated that:

> "[The trial court] must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence."

In the case at bar, it became obvious that the Trial Court was unimpressed with the defense.

In United States v. Fernandez, 480 F.2d 726 (2nd Cir., 1973), this Court noted an increased sensitivity to the danger of jurors' vulnerability to a judge's partiality. United States v. Guglielmini, 384 F.2d 602, 605 (2nd Cir., 1967). In United States v. Curcio, 279 F.2d 681 (2nd Cir., 1960), this Court again stated that a Trial Court should not

> ". . . take the course of the trial out of the hands of competent attorneys, nor show by any interjected remarks his own view of the evidence."

Here, the Court did exactly that when he gave the jury his own view on the visibility of Appellant's scars. See, also,

United States v. Nazzaro, 472 F.2d 302 (2nd Cir., 1973).

In this case, the Court's interference clearly imparted to the jury his own attitude toward the defense and necessarily toward the strength of the Government's case. The impact of this interference under the circumstances of this case cannot be minimized and provides sufficient basis for reversal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of Conviction herein should be reversed and the matter remanded for a new trial.

Respectfully submitted,

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Attorneys for Defendant-Appellant

GERALD L. SHARGEL
Of Counsel

Service of ~~three (3)~~ Two (2) copies of the within is hereby admitted

this day of

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Attorney(s) for